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No. 98-6322

# IN THE SUPREME COURT OF THE UNITED STATES

ANTONIO T. SLACK, *Petitioner*,

v.

E.K. McDANIEL, Warden, Ely Nevada State Prison, et al.,
*Respondents.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF OF AMICI CURIAE STATES OF CALIFORNIA, ALABAMA, ALASKA, ARIZONA, ARKANSAS, DELAWARE, FLORIDA, IOWA, KANSAS, LOUISIANA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEW MEXICO, NORTH CAROLINA, OKLAHOMA, PENNSYLVANIA, SOUTH CAROLINA, TENNESSEE, UTAH, AND WASHINGTON IN SUPPORT OF RESPONDENT

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## QUESTIONS PRESENTED

1. Do the provisions of AEDPA, specifically including 28 U.S.C. §2253(c) and 28 U.S.C. §2244(b), control the proceedings on appeal?

2. If AEDPA does control the proceedings on appeal, may a certificate of appealability issue under 28 U.S.C. §2253(c)?

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## INTEREST OF AMICI CURIAE

All decisions by this Court concerning habeas corpus applications filed pursuant to Section 2254[1] of Title 28 of the United States Code are of interest to amici, as amici are responsible for defending presumptively valid state court criminal convictions against federal habeas corpus challenges. The issues of whether the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), specifically Sections 2244(b) and 2253(c), apply to any claims asserted after April 24, 1996, via amendment to an existing petition, or in a new petition, and whether Section 2253(c) nevertheless applies to any appeal that was commenced after the enactment date of

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1. All further references to "sections" are to sections of Title 28 of the United States Code, unless otherwise specified.

the AEDPA, are therefore of significant concern to amici. Likewise, whether Congress, in amending Section 2253, intended to preclude appeals like the instant one because it does not involve any "constitutional" issues is also of substantial interest to amici.[2]

## SUMMARY OF ARGUMENT

The provisions of chapter 153 of the Judicial Code, as amended by the AEDPA, specifically including Sections 2244(b) and 2253(c), apply to this case. Slack seeks appellate review of the district court's dismissal of five claims on second or successive petition/abuse of the writ grounds. Those five claims were not added to Slack's Section 2254 petition until *after* April 24, 1996, the day the AEDPA was enacted. That takes this case outside the confines of this Court's holding in *Lindh v. Murphy*, 521 U.S. 320 (1977), "that the new provisions of chapter 153 generally apply only to cases filed after the Act became effective." *Id.*, at 336. *Lindh* did not define what constituted a "case filed" for purposes of its decision. Defining such a "case" in terms of when the subject *claims* for relief were actually asserted, rather than in terms of other events, best reflects Congress's intent in enacting the AEDPA. Moreover, Section 2253(c) applies to any appeal initiated after the enactment date of the AEDPA, regardless of when the original application for relief was filed in district court.

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2. This brief is submitted in support of respondents by amici through their respective Attorneys General in accordance with Rules 37.2 and 37.5 of the Rules of the Supreme Court of the United States. Because amici discussed the first question extensively in their prior brief, filed in June 1999, and because amici understand that question will be further thoroughly addressed in other briefs, amici focus primarily on the second question here. *See* Rule 37.1 of the Rules of the Supreme Court of the United States.



Because the AEDPA applies in this case, Slack must show the substantial violation of a *constitutional* right to justify the issuance of a certificate of appealability ("COA"), which is a jurisdictional prerequisite to a habeas corpus appeal. In this regard, because any appeal necessarily involves a higher court reviewing the *decision* of a lower, it is the district court decision that must be the focus for purposes of whether a COA should issue. In other words, the district court's denial of relief must be based on constitutional grounds before a COA could properly be issued. Because the denial of relief on second or successive petition/abuse of the writ grounds in this case was not based on the Constitution, Slack can not meet the COA standard. This appeal should be dismissed.

## ARGUMENT

### I.

### 28 U.S.C. Sections 2244 And 2253, As Amended By The AEDPA, Apply To Any Claim Asserted After April 24, 1996, Whether By Filing A New Petition, Or By Amending An Already Existing Petition; And Section 2253(c) Nevertheless Applies To Any Appeal Where The Request To Appeal, Or Notice Of Appeal, Was Filed After The Enactment Date Of The AEDPA.

In *Lindh*, this Court held "that the new provisions of chapter 153 generally apply only to *cases filed* after the Act became effective." 521 U.S. at 336 (emphasis added). However, *Lindh* neither confronted nor answered the question of whether the new provisions would apply to claims amended into an already existing

petition after the statute's enactment. As discussed in detail in the States' Amicus Brief dated June 21, 1999, at 4-13, the "case" should be viewed in terms of when the actual claims for relief were asserted. Amici here briefly summarize that argument.

The *Lindh* majority's holding, that Congress intended the provisions of chapter 153 to apply only to cases filed after April 24, 1996, dealt only with claims for relief asserted prior to that date. As to claims asserted *after* the enactment date of the AEDPA, via amendment or otherwise, both Congress and *Lindh* are silent as to whether the AEDPA applies. As a result, amici submit, general retroactivity principles resolve the issue. Because the assertion of a claim for relief is the pertinent retroactivity event, applying the AEDPA to claims asserted after April 24, 1996, constitutes a proper, prospective application of the law. *See Landgraf v. USI Film Products*, 511 U.S. 244, 291 (1994) (Scalia, J., concurring). The AEDPA's amendments in chapter 153, including those in Section 2244 and 2253, apply to each of Slack's five dismissed claims, as they were all asserted after April 24, 1996.

With respect to Section 2253(c) specifically, the COA requirement should therefore apply to any claim that is the subject of the intended appeal if that claim was raised after the enactment date of the AEDPA. In any event, Section 2253(c) should apply to any appeal initiated after April 24, 1996, via the filing of an application for permission to appeal, or a notice of appeal itself. *Tiedman v. Benson*, 122 F.3d 518, 520-21 (8th Cir. 1997); *see also Hohn v. United States*, 118 S. Ct. 1969 (1998) (resolving a COA issue where appeal initiated after enactment date of AEDPA, but actual Section 2255 motion filed prior to that date). In either case, all five of Slack's claims that were dismissed by the district court on second or successive petition/abuse of the writ grounds were and are covered by all provisions of chapter 153 as



amended by the AEDPA, specifically including Sections 2244(b) and 2253(c).

## II.

## Because Slack's Intended Appeal Does Not Involve A Constitutional Issue, Let Alone A "Substantial" One, As Required By Section 2253(c), He May Not Properly Be Issued A Certificate Of Appealability, And This Appeal Should Be Dismissed

Under the AEDPA, before a habeas applicant in a Section 2254 (or 2255) case can appeal a final district court order, a COA must be issued by a circuit judge or justice. 28 U.S.C. §2253(c)(1). The COA may issue "only if the applicant has made a substantial showing of the denial of a *constitutional* right." 28 U.S.C. §2253(c)(2) (emphasis added). In this regard, because any appeal necessarily involves a higher court reviewing the *decision* of a lower court, the denial of relief reflected in the lower court's decision must be grounded in the Constitution before a COA may properly be issued. Under the pre-AEDPA certificate of probable cause standard, it was never necessary for an issuing court to look beyond the four corners of the district court order that was the subject of the intended appeal in order to determine whether there had been a violation of a "federal right," within the meaning of *Barefoot v. Estelle*, 463 U.S. 880 (1993). There is nothing in the AEDPA that indicates Congress intended the federal courts to start looking in other places to determine whether the COA standard has been met.

This AEDPA standard constitutes a significant departure from the pre-AEDPA requirement that a Section 2254 applicant make only a substantial showing of the violation of a "federal right" in order to obtain

permission to appeal.[3] *Barefoot*, 463 U.S. at 893. Under the old *Barefoot* standard, district court decisions denying habeas relief on non-constitutional grounds, like second or successive petition/abuse of the writ, were potentially reviewable because such rulings were grounded in federal rules and statutory law. *See* 28 U.S.C. §2244(b); Rules Governing Section 2254 Cases In United States District Courts, Rule 9(b), 28 U.S.C. foll. § 2254. The new AEDPA standard, requiring a showing of a constitutional violation, changes that. Whether a habeas corpus application is second or successive is *not* a constitutional question. *See Felker v. Turpin*, 518 U.S. 651, 664 (1996) (application of abuse of the writ doctrine as delineated by case law and later tightened by statute does not infringe on the Constitution); *see also McCleskey v. Zant*, 499 U.S. 467, 479-89 (1991) (doctrines of second or successive petition and "abuse of the writ refer[] to [] complex and evolving bod[ies] of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions," but not by constitutional mandate). Such non-constitutional questions are therefore unreviewable on appeal under the AEDPA.

In amending Section 2253, Congress chose specific language that precluded habeas appeals not involving substantial constitutional issues. As discussed in the States' original Amicus Brief, the plain language of Section 2253, as amended by the AEDPA, the legislative history, and the traditional rules of statutory construction support that conclusion. Congress specifically changed "federal right" to "constitutional right" in amending Section 2253. Because "federal" and "constitutional" do not share identical meanings, Congress's intent to limit direct

3. Prior to the enactment of the AEDPA, Section 2255 applicants were not required to obtain any type of permission prior to appealing a district court ruling. *See* 28 U.S.C. §2253 (pre-AEDPA version).



appeals in Section 2254 cases to only those involving district court denials on constitutional grounds is apparent. *See* Brief of Amici Curiae States of California, et al., dated June 21, 1999, at 21-25. The United States Court of Appeals for the Fourth Circuit, in *Murphy v. Netherland*, 116 F.3d 97 (4th Cir. 1997), adopted this obvious interpretation in refusing to issue a COA to a state inmate seeking review of a district court order that had denied relief on non-constitutional grounds.

Some lower federal appellate courts, however, have erroneously held that, despite the undeniable language used in Section 2253(c), Congress did not intend to preclude direct appellate review of procedural issues that could dispose of an entire Section 2254 petition, or a claim or claims therein. For example, the United States Court of Appeals for the Fifth Circuit has manufactured a two-part test to determine whether a procedural denial, such as one based on the one-year limitations period in Section 2244(d), is subject to review under the Section 2253(c) COA standard. According to that court, a COA may issue if a habeas applicant makes (1) a credible showing that the district court's procedural ruling was incorrect, and (2) a substantial showing that the underlying habeas petition alleges a deprivation of constitutional rights. *Sonnier v. Johnson*, 161 F.3d 941, 943-44 (5th Cir. 1998); *accord Morris v. Horn*, 187 F.3d 333, 340-41 (3rd Cir. 1999) (relying on the Fifth Circuit test). These courts have improperly evaded congressional intent by adding language and requirements to Section 2253(c) that do not exist. Other courts, too, have incorrectly allowed appellate review of non-constitutional issues without engaging in any analysis of Section 2253(c) whatsoever. *E.g.*, *Gaskins v. Duval*, 183 F.3d 8, 9 n.1 (1st Cir. 1999); *Thomas v. Greiner*, 174 F.3d 260 (8th Cir. 1999); *Nichols v. Bowersox*, 172 F.3d 1068, 1070 n.2 (8th Cir. 1999).

Slack might rely on the foregoing cases to argue that the focus, for purposes of determining whether a COA should issue, is on the underlying claims in the Section 2254 application itself, as opposed to the district court's decision. *See, e.g.*, Slack's August 1999 Reply at 16-17. Under this view, Slack would be entitled to a COA because his underlying claims in the Section 2254 application itself assert violations of the Constitution. *Id.* For the reasons that follow, the holdings in the cases discussed above, and any argument by Slack relying on them, must be rejected.

First, as touched on previously, it is beyond debate that any appeal, in the habeas corpus context or otherwise, involves a higher court reviewing the *decision* of a lower court. Section 2253(a) makes quite clear that:

> In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, *the final order shall be subject to review*, on appeal, by the court of appeals for the circuit in which the proceeding is held.

28 U.S.C. §2253(a) (emphasis added). Because it is a "final order" being reviewed, it is the final order that must be the focus for purposes of determining whether a COA should issue. Here, Slack challenges the district court's final order denying five claims on second or successive petition/abuse of the writ grounds. Because that order raises no constitutional questions, the order may not be reviewed under Section 2253(c).

The foregoing interpretation is further supported by the fact that, under the old *Barefoot* "federal right" standard, it was *never* necessary to look beyond the district court order denying habeas relief to determine whether a certificate of probable cause ("CPC") should issue. Virtually every ruling handed down by a district court denying habeas corpus relief would have been based on



the Constitution, or some procedural rule that was either judicially created or statutory in nature, and therefore a "federal right." Thus, reviewing courts never had occasion to look to the claims in the habeas application itself when deciding whether to issue a CPC. *See, e.g., Parkhurst v. Shillinger*, 128 F.3d 1366 (10th Cir. 1997) (CPC granted to determine correctness of district court's order dismissing petition for failure to exhaust); *Phillips v. Vasquez*, 56 F.3d 1030 (9th Cir 1994) (same); *Hall v. DiPaolo*, 986 F.2d 7 (1st Cir. 1993) (same); *Duttry v. SCIP Superintendent Petsock, et al.*, 878 F.2d 123 (3rd Cir. 1989) (same); *Mathis v. Hood*, 851 F.2d 612 (2d Cir. 1988) (same).

That being the case, there is no reason to believe that Congress, in enacting the AEDPA, suddenly wanted circuit judges or justices to look beyond the four corners of a district court order/judgment when determining whether to issue a COA. Nothing in the AEDPA, or anywhere else, instructs the federal courts to look, for the first time ever, somewhere other than to the district court order when deciding whether a COA should issue. Had Congress intended the issuing courts to engage in this unprecedented practice, one would expect that Congress would have said something in that regard. *See Finley v. United States*, 490 U.S. 545, 554 (1989) ("Under established canons of statutory construction, 'it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.'") (citation omitted). This Court should not disregard the express rule set forth by Congress in Section 2253(c) so as to allow improper review of district court decisions not based on constitutional grounds.

Certainly, by changing "federal right" to "constitutional right," with respect to the showing required to warrant the issuance of a COA, Congress clearly intended to preclude appellate review of certain issues. Slack may argue that any change relates only to Section 2254 cases where relief

was sought for something other than a constitutional violation. *See* 28 U.S.C. §2254(a) (someone in custody pursuant to a state court judgment may seek habeas relief by showing the custody is unlawful under "the Constitution or laws or treaties of the United States"). This exclusive interpretation, however, appears highly unlikely.

As far as amici can tell, this Court has *never* granted relief in a Section 2254 case for anything other than a violation of the Constitution. In other words, despite the fact that Section 2254(a) permits the granting of habeas corpus relief for a state prisoner in custody "in violation of the Constitution or laws or treaties of the United States," it does not appear that a treaty or federal law, rather than the Constitution, has *ever* provided the basis for this Court to grant habeas corpus relief in a Section 2254 case.[4] Thus, amici respectfully submit that it would make no sense to conclude that Congress elevated the *Barefoot* "federal right" standard to the current "constitutional right" standard simply to preclude habeas appeals involving claims based on treaties or non-constitutional federal laws, when such cases rarely had occurred, rarely had been successful, and had *never* been successful in this Court.

To the contrary, Congress was attempting to limit substantially the issues to be litigated on appeal in Section 2254 cases by reducing such appeals to those requiring

4. On rare occasions, Section 2254 applicants have attempted to obtain relief based on an alleged violation of a treaty, *see, e.g.*, *Breard v. Greene*, 523 U.S. 371 (1998), or the Interstate Agreement on Detainers (IAD), which is a non-constitutional federal law applicable to the states that are parties to the agreement. *Reed v. Farley*, 512 U.S. 339 (1994). While some lower federal appellate courts have granted Section 2254 relief based on a violation of the IAD, amici's research shows the number of published cases in that regard to be less than ten. *See, e.g.*, *Gibson v. Klevenhagen*, 777 F.2d 1056 (5th Cir. 1985); *Nash v. Jeffes*, 739 F.2d 878 (3rd Cir. 1984); *Cavallaro v. Wyrick*, 701 F.2d 1273 (8th Cir. 1983); *Cody v. Morris*, 623 F.2d 101 (9th Cir. 1980); *Stroble v. Anderson*, 587 F.2d 830 (6th Cir. 1978).



resolution of constitutional questions, and excluding appellate review of habeas denials based on procedural grounds, such as the new AEDPA statute of limitations or provisions against second or successive petition.[5] Such limitations are entirely consistent with, and representative of, the overall express congressional intent behind the enactment of the AEDPA in the first place. For example, the one-year limitations period of Section 2244(d) is a clear reflection of "Congress's desire to accelerate the federal habeas process." *Calderon v. United States District Court for the Central District (Beeler)*, 112 F.3d 386, 391 (9th Cir. 1997), overruled on another point in *Calderon v. United States District Court for the Central District of California (Kelly)*, 163 F.3d 530 (9th Cir. 1998) (en banc). Likewise, the AEDPA's more restrictive second or successive petition provisions of Section 2244(b), and severe limitations on the availability of evidentiary hearings, as reflected in Section 2254(e), reinforce the fact that the AEDPA was enacted to speed up the federal habeas process, cut back on repeated proceedings, including appeals, and that "Congress intended to restrict the availability of habeas corpus relief when it passed the Act. . . ." *Greenawalt v. Stewart*, 105 F.3d 1268, 1275 (9th Cir. 1997).

Though not necessarily specific to Section 2253(c), the congressional floor debates concerning the AEDPA constitute a further example of Congress's intent to substantially limit the availability of federal habeas corpus relief, and to expedite habeas corpus proceedings. For example, Senator Arlen Specter explained that reform was sorely needed because "[t]he great writ of habeas corpus"

5. Due to the specific language in Section 2253(c), habeas appeals involving an alleged violation of a treaty or non-constitutional federal law are now precluded, even though such cases were clearly not Congress's inspiration for elevating the showing necessary to warrant the issuance of a COA. *See, e.g.*, *Murphy*, 116 F.3d 97.

was being "applied in a crazy-quilt manner with *virtually endless appeals* that deny justice to victims and defendants alike, making a mockery of the judicial system." 141 Cong. Rec. S4591 (emphasis added). Senator Orrin Hatch, co-sponsor of the habeas corpus reform bill, likewise emphasized the need to "stop *repeated assaults* upon fair and valid State convictions through spurious petitions filed in Federal court" and described the bill as the instrument by which to protect "constitutional guarantees of freedom from illegal punishment, while at the same time ensuring that lawfully convicted criminals will not be able to twist the criminal justice system to their own advantage." 141 Cong. Rec. S4596 (emphasis added).

Additionally, Representative Henry Hyde, like Senators Specter and Hatch, explained that such reform was necessary to preempt the "abuse of habeas corpus" by convicted capital murderers whose sole aim is to "stretch it out." 142 Cong. Rec. H2182, H2184, H2249 (daily eds. March 13-14, 1996). Representative Bill McCollum, a co-proponent of the bill, expressed a similar sentiment, explaining that, by allowing death row inmates into federal court "one time and one time only," the bill would end "the seemingly endless appeals" and "15- and 20-year delays of carrying out . . . the death penalty." 142 Cong. Rec. H2143 (daily ed. March 13, 1996).

Clearly, habeas corpus reform in the death penalty context was a major concern, due to the incredible length of time it was taking for capital cases to run their course through the federal habeas process. But the purpose of habeas corpus reform was not limited to the death penalty arena. As Senator Specter stated, it was "time to move ahead with legislation to reform habeas corpus *in all cases*." 141 Cong. Rec. S7803 (daily ed. June 7, 1995) (emphasis added). The provisions of chapter 153, as amended by the AEDPA, apply to *all* habeas corpus cases, and those provisions, including Section 2253(c), illustrate Congress's intent to expedite the habeas corpus



process in capital and non-capital cases alike by eliminating appeals that did not directly implicate the Constitution.

Against that backdrop, it is clear that there is nothing draconian about reducing Section 2254 and 2255 appeals to only those cases presenting constitutional questions. It must be remembered that in a Section 2254 case, particularly a non-capital case like this one, there have already been multiple layers of judicial review prior to the contemplation of a federal appeal. Here, Slack had a state trial, and then a state appeal which was denied on the merits by the Nevada Supreme Court.[6] He then pursued post-conviction review in the Nevada trial court and, when that was denied, he returned to the Nevada Supreme Court where his claims were reviewed and relief was denied again. Thereafter, he pursued relief in the federal district court, where five of his claims were dismissed on second or successive petition/abuse of the writ grounds. It is not as if precluding yet another layer of judicial review is somehow unfair or would compromise the accuracy of the previous determinations made by state and federal courts that Slack is not entitled to any relief. It was not harsh for Congress to decide that, because habeas applicants like Slack already have had ample judicial review, they may pursue direct appeals in habeas corpus cases only on constitutional questions. Absent a constitutional question, the compelling interest in finality of state court convictions outweighs any interest in further review by direct appeal.

To be sure, amici have not asserted here that a procedural ruling, such as the second or successive petition ruling in this case, can never be subject to any

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6. After his appeal was denied by the Nevada Supreme Court, Slack filed his first federal habeas corpus petition. However, that petition was dismissed without prejudice so Slack could return to state court and exhaust additional claims.

review. All amici have argued is that, pursuant to the express language of Section 2253(c), ordinary direct appeal is unavailable for non-constitutional questions. In an extraordinary case, a Section 2254 applicant might still seek review of a district court's procedural ruling in the context of a petition for a writ of mandate/prohibition, pursuant to 28 U.S.C. §1651, if the applicable standard could be met. Hence, for truly egregious procedural rulings, relief might be available. For example, if a district court denied a petition on statute of limitations grounds, and it was indisputable that the petition was in fact timely, a petitioner well might be able to satisfy the standard necessary to warrant the granting of mandamus relief.[7/] *See Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 26 (1943) (writ relief available where no other adequate means to attain relief); *Banker's Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953) (to obtain relief pursuant to Section 1651, must show right to relief is clear and indisputable).

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7. Federal review ultimately might prove unavailable, however, for a type of claim often dismissed in the district court on non-constitutional grounds. Denials without prejudice for failure to exhaust do not really act as a bar to habeas corpus relief; they simply delay a petitioner's ability to seek federal relief. So long as the petitioner returns to state court and properly exhausts all available remedies, and then returns to federal court in a timely manner, habeas review on the merits, and appeal from an adverse ruling on the merits of the constitutional claims, will still ordinarily be available. Thus, a habeas petitioner would be hard pressed to argue that the preclusion of any type of judicial review for an exhaustion issue constitutes a deprivation of anything meaningful.



## CONCLUSION

Accordingly, amici respectfully request that this Court find the provisions of chapter 153 of the AEDPA, including Section 2253(c), applicable to this case. Amici also ask that this Court find Slack unable to meet the COA standard of showing the substantial violation of a constitutional right, and therefore order the appeal dismissed.

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Respectfully submitted,

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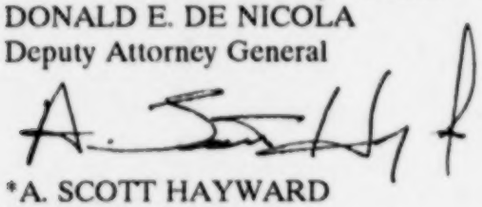

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